# No. 22,462

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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TRUCKING, UNLIMITED, et al.,
*Appellants,*

vs.

CALIFORNIA MOTOR TRANSPORT CO., et al.,
*Appellees.*

**On Appeal from the United States District Court for the Northern District of California**

## REPLY BRIEF FOR APPELLANTS

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### SUMMARY OF ARGUMENT

The present issue before the court is to determine whether plaintiffs' complaint states a cause of action. It is, therefore, necessary first to understand the allegations of the complaint. In large measure the allegations speak for themselves. Nevertheless, defendants have misconstrued the complaint in contending that it charges them with combining and acting primarily to influence public officials. (Ap'ees Br. 31.) This case does not present the question whether a combination of competitors to change public policy through a program of litigation may be immune from

the antitrust laws. Rather, plaintiffs have alleged facts which raise two principal points of law:

**I. Misuse of Judicial Process.**

Plaintiffs contend that defendants have violated the Sherman Act by instituting a program of litigation in the agencies and courts using their judicial processes —not their law-making processes—primarily in order to eliminate the individual private business rights of competitors—not to change law or public policy, or to effect other legitimate objectives. Plaintiffs thus contend that:

(A) Whether defendants' activities are found to be "political" or "non-political," if their objectives have been sought through the use of judicial processes, the use of such processes is permissible only if the objectives themselves are legitimate, as they were in *NAACP v. Button*. Where petitioning of executive and legislative agencies is involved, otherwise illegal objectives such as harassment or the impairment of competition may be sought, as in *Noerr*. But where harassment or the impairment of competition is sought through the use of *judicial* processes, the illegality of the objective is relevant in determining the illegality of the process used. Use of judicial process to accomplish illegal objectives constitutes, as a matter of law, an illegal "misuse" of judicial process.

(B) Even if it can be said, however, that *Button* applies *Noerr* protection—that is, regardless of intent to accomplish illegal objectives—to some forms of

judicial petitioning, such protection would extend only to the resolution of "political" issues. Under defendants' own analysis of *Noerr, Pennington* and *Button,* protection of conspiratorial activities which otherwise would be in violation of the antitrust laws (or any other laws) is available only where such activity takes the form of "political" petitioning as defined in those cases. Defendants' activities were not political expressions and therefore cannot be protected even under defendants' own view of those cases.

**II. Sham Attempts to Influence Government.**

Even if it is found as a matter of law that attempts to harass and restrain competition through judicial processes might be considered "political" activity within the protections afforded by *Noerr,* in fact defendants' activities in this case show them to be "sham." The primary purpose and actual effect of defendants' actions were not to attempt genuinely to influence government, but to prevent competitors from having access to operating rights controlled by government agencies. Any attempts to influence government decisions on plaintiffs' applications for rights were incidental to defendants' attempts directly to restrain plaintiffs from applying for such rights.

I. A USE OF THE JUDICIAL PROCESSES OF THE COMMISSIONS AND COURTS FOR THE PURPOSES OF ELIMINATING PRIVATE BUSINESS RIGHTS OF COMPETITORS IS NOT WITHIN THE PROTECTION OF NOERR, AND IS SUBJECT TO THE SHERMAN ACT.

**A. Misuse of Courts Is Not Shielded by the Right of Petition Even Where the Activities Involved May Be Characterized As Political.**

The constitutional guaranty of the right of assembly and petition protects group access to courts, *United Mine Workers of Am. v. Illinois State Bar,* 389 U.S. 217 (1967), *Bhd. of Railroad Trainmen v. Virginia State Bar,* 377 U.S. 1 (1964), *NAACP v. Button,* 371 U.S. 415 (1963) as well as access to the legislative and executive branches, *Eastern Railroad Presidents Conference v. Noerr,* 365 U.S. 127 (1961). It is well established, however, that access to legislative and executive agencies in order to inform government officials is practically unfettered, while access to courts and the uses to which courts may be put to achieve private ends is not nearly so free from restraint. Plaintiffs have pointed out in their opening brief that application of the guaranty of the right of petition is applied differently to courts, on the one hand, and the legislative and executive branches of government, on the other. (Ap'ants Br. pp. 59-65.) As plaintiffs have pointed out, the ability of the courts to police misuses of judicial forums is well established, while their ability to police the political processes of the legislative and executive branches is contrary to the constitutional concept of a separation of powers. Thus, in the present case, as in the patent-antitrust cases, where the medium for an attempted

conspiratorial restraint is the judicial processes of the courts and commissions, many of the reasons for the courts' hesitancy to apply the Sherman Act in *Noerr* and *Pennington* simply do not apply. Plaintiffs have also cited examples of this principle of limited access to judicial processes for illegitimate purposes, e.g., malicious prosecution, abuse of process, contempt, harassment through judicial action, and patent litigation for anti-competitive purposes. These principles cannot be seriously contested. Plaintiffs therefore contend that where the judicial processes of the courts and commissions are used for purposes of harassment or antitrust restraint, the processes are in fact "misused" and are not protected by *Noerr* or other authority from any of the penalties attaching to such misuse—antitrust, malicious prosecution, or whatever.

Although defendants do not deny that they have used the judicial processes of the commissions and courts in this case, they contend that they have used them for political purposes—to influence policy-making decisions akin to legislatively made law—in the same manner that they might have influenced the legislature itself within the protections of *Noerr*. In support of this proposition they rely heavily on *NAACP v. Button*, 371 U.S. 415 (1963). They argue that *Button* disposes of plaintiffs' case because *Button* protected a group use of judicial machinery for political purposes, and therefore it is irrelevant whether defendants' activities before the commissions and courts were "judicial," "executive," or "legislative."

*Noerr, Pennington,* and *Button,* they contend, protect all forms of conspiratorial petitioning for any purpose, including harassment and restraint of competition.

In citing *Button* for the argument that their activity was supposedly political in nature, the defendants have failed to address themselves to a basic question which must be answered before any discussion of the "political" or "non-political" nature of their activities becomes relevant. That question is whether or not defendants have used judicial processes in order to accomplish unlawful objectives. In *Button* the Supreme Court found that the litigation by the NAACP was, as defendants stress, "not a technique of resolving private differences," but "a form of political expression." (371 U.S. at 429.) But equally important, the court found that the litigation in that case was "a means of achieving *lawful objectives,*" a factor nowhere discussed in defendants' brief. (371 U.S. at 429.) The court found that the NAACP and members of the Negro community in this country had been denied the more orthodox means of political expression, such as voting, and that "under the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances." (371 U.S. at 430.) The court cited *Noerr* not for the proposition that judicial processes might be used regardless of intent or purpose, but merely for the general proposition that the First and Fourteenth Amendments "protect certain forms of orderly group activity." (371 U.S. at 430.)

Thus, there are three salient features present in *Button* which distinguish it from the present case: First, the court emphasized the legitimacy of the NAACP's intent and purpose, and the lawfulness of their objectives. Unlike the present case, and unlike *Noerr* and *Pennington,* the NAACP's petitioning did not intentionally or actually harass their adversaries or restrict them from a similar petitioning of the courts resulting in a restraint of trade or any similar illegal objective. Second, the combination seeking to use judicial processes did so for what were clearly found to be a means of *political* expression. Third, the court made it clear that as a method of redressing grievances, the NAACP had no alternative to the litigation employed.

It is clear, then, that *Button* does not protect petitioning through the judiciary for any purpose whatsoever. Not only was the objective sought in that case legitimate, but the Court stated that judicial petitioning to harass or accomplish other unworthy or illegal objectives is not protected by the First Amendment.

> "Malicious intent was of the essence of the common law offenses of fomenting or stirring up litigation. * * * Hostility still exists to stirring up private litigation where it promotes *the use of legal machinery to oppress:* As, for example, to sow discord in a family; to expose infirmities in land titles, as by hunting up claims of adverse possession; *to harass large companies through a multiplicity of small claims;* or to oppress debtors as by seeking out unsatisfied judgments. For a member of the bar to participate, directly or through intermediaries, in such misuses of the

> legal process is conduct traditionally condemned as injurious to the public." (371 U.S. at 440. Emphasis added.)

The case confirms that where judicial petitioning is involved, the motives and intent behind the petitioners' litigation are relevant in determining the legality of the litigation employed.

The Supreme Court in *United Mine Workers of Am. v. Illinois Bar Assoc.,* 389 U.S. 217 (1967) further confirmed this principle. In that case the question presented was whether the Union might employ a licensed attorney on a salaried basis to represent any of its members who wished his services to prosecute workmen's compensation claims before the Illinois Industrial Commission. The Illinois State Bar Canons of Professional Ethics forbade such a practice, and the Illinois Supreme Court, in supervising such practices, affirmed an injunction against it.

The Supreme Court reversed the State court on the grounds that such access to the judiciary was protected by freedom of speech and the right to petition under the First and Fourteenth Amendments. In so doing, the entire thrust of the Court's opinion was to inquire into the legitimacy of the objectives sought to be served through the Union's proposed use of judicial processes.[1] The Court balanced the evils which might flow from permitting such a scheme with the legitimate objectives that might be served, and concluded that the latter outweighed the former. (389

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[1]The court also noted that the right to petition applied to "private" as well as "political" causes, a point which is discussed in Part B below (see p. 13).

U.S. at 219-223.) If illegitimate objectives had been found to be the purpose or result of the Union's plan in that case, the Court would not have extended First Amendment rights to the judicial petitioning proposed. On this point, even the dissent was in agreement.[2]

The first question, therefore, is not to determine whether defendants' activities were "political" or "non-political" expressions, but whether defendants used judicial processes in order to achieve illegitimate objectives. Plaintiffs have set forth in detail in the complaint and their opening brief facts which establish conclusively that the purpose and the actual result of defendants' plan was to suppress and eliminate competition. This objective standing alone is clearly illegitimate and in violation of the antitrust laws. Plaintiffs have also pointed out in their opening brief that the processes employed by defendants in achieving their antitrust aims were judicial rather than legislative or executive. The existence of these two factors—the use of judicial processes to achieve an

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[2]In dissenting, Justice Harlan stated as follows:

> "Although I agree with the balancing approach employed by the majority, I find that the scales tip differently. * * * The plan [of the Union] is evidently designed to help injured union members in three ways: (1) by assuring that they will have knowledge of and access to an attorney capable of handling their claim; (2) by guaranteeing that they will not be charged excessive legal fees; and (3) by protecting them from crippling, even though reasonable, fees by making legal costs payable collectively through union dues. *These are legitimate and laudable goals.* However, the union plan is by no means necessary for their achievement." (389 U.S. at 228.)

Justice Harlan went on to dissent on the grounds that although the goals sought were legitimate, they might have been realized within the framework of existing State law.

illegal objective—distinguishes this case from the narrow antitrust exemption provided in *Noerr*.

Defendants contend that if a method of influencing public officials can be shown to be political in nature, it no longer matters whether those officials are executive, legislative, or judicial. The argument misses vital distinctions between the dispute-resolving functions of these different government agencies. Litigation—whether it concerns certificates of public convenience and necessity, patents, workmen's compensation, personal injuries or property damages—is nonetheless litigation involving judicial processes between private parties. Such determinations are made through the adjudicative procedures unique to courts. Litigation is conducted on a case and controversy method of resolving private disputes even where broad policy questions affecting others than the litigants are involved. If competitors choose the courts to achieve anti-competitive purposes, then they are bound by the rules—constitutional, statutory and common law—which control their conduct before courts. Even in *Button,* where the NAACP's activity was found to be political expression through judicial processes, it is apparent that the rules controlling and limiting the uses of courts were not violated inasmuch as the courts were not used to accomplish any unlawful aims.

None of the three major branches of government may be unreasonably closed to petitioners who seek redress of grievances. Nevertheless, recognition has always been given to the varying methods of opera-

tion characterizing courts, legislatures, and executive offices. The procedures for expressing one's views vary greatly in each of these branches of government. No person may abuse the processes of the governmental agency he seeks to influence—whether his expression is political or not—and still claim constitutional protection. The legislative and executive branches have standards under which they may be lobbied. Acts requiring registration of lobbyists, rules against bribery or undue influence, and regulations governing time, place and manner are examples of such control. Such standards, to be sure, leave the channels of communication largely unfettered between elected officials and their constituents. However, the criteria governing modes of expression in courts are considerably different. Since litigation is conducted on a case and controversy basis, no judge may be lobbied in a litigated dispute. The processes of the courts may not be deliberately activated or interfered with in order to achieve an anti-competitive result. They may not be used to vent one's malice upon another. Thus, the intent and purpose of a party in using the courts may be ascertained in order to determine if the courts have been misused for an unlawful purpose. The courts have traditionally protected their processes against such misuse and the cases clearly support this concept. Indeed, plaintiffs know of no case which has held that judicial processes may be lawfully used to accomplish an unlawful objective—whether the objective is wrapped up with political considerations or not.

**B. Defendants' Activities Were Not a Form of Political Expression and Hence Are Not Within the Protection of Noerr or Button.**

Assuming for the moment, as defendants argue, that *Button* protects petitioning through judicial processes regardless of one's intent or purpose to accomplish illegal goals, it is undisputed that such petitioning is permitted only if the petitioning process or the goals sought are found to be "political." The political nature of the petitioning process, so the argument goes, is of paramount value in comparison to other values such as the antitrust laws whose application, if permitted, would illegalize the petitioners' activity and thus hamper the political process upon which political decisions are made.

Where petitioning involves the resolution of non-political disputes, however, the law applies the same standards to litigation as are applied to judicial petitioning generally, as discussed in plaintiffs' opening brief and in Part A above. That is, where the petitioning process does not involve the resolution of political questions, there are not even arguable grounds for safeguarding the process to the extent of disregarding the illegal objectives sought, as they were in *Noerr*. Where petitioning is not political in nature, intent, motive and objective are therefore relevant in judging the legality of the conspiracy and the petitioning methods it uses.[3]

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[3]Plaintiffs repeat that this discussion is made *arguendo* only. As stated in Part A above, plaintiffs believe that even if political disputes are sought to be resolved, if they are coupled with an illegal or illegitimate objective, and sought to be achieved through judicial as opposed to other processes, the illegality of the objectives sought serve to deny protection to the methods used.

This is not to say that all non-political petitioning is denied First Amendment protection. As the court in *United Mine Workers of Am. v. Illinois State Bar Assoc.,* 389 U.S. 217 (1967) pointed out, it is not necessary to espouse a political issue or attempt to resolve an issue through political channels in order to obtain First Amendment protections generally. But as *Button* also points out, and as *Illinois Bar* implicitly recognizes, where private objectives are sought to be served through the *judicial* petitioning process, the intended objectives of the petitioner are relevant to determine whether his activities are protected.

Assuming, then, that the degree of protection afforded political petitioning is arguably greater than that afforded private or non-political petitioning, it is necessary to decide whether the defendants' program of litigation in this case is "political" or not. Plaintiffs believe that defendants' activity was not political in nature, and that the individual plaintiffs' applications for carrier rights involved essentially a contest among carriers for private business rights, similar to the private business rights disputed in the patent-antitrust cases.

Defendants, on the other hand, argue that "public convenience and necessity" standards by which individual applications are adjudicated are so broad, and so greatly involve the making of public policy similar to law made by the legislature, that it is fair to call commission procedures and court review of them "political expression." They dismiss the patent-antitrust cases, where conspiratorial litigation for pur-

poses of restraining competition has been held to be an antitrust violation, on the grounds that these cases involve the settling of purely private disputes, while the present case involves the settling of rules, regulations, and "public policy" in a manner supposedly political—and thus *Noerr* protected—rather than private in nature.

Defendants, we believe, are totally unconvincing in contending that the patent-antitrust cases are not indications that the carrier rights in this case are essentially private, and that their dispensation is made through a process essentially non-political. The certificate and transfer proceedings involved in the present case are as much a resolution of disputes over private rights as are those in the patent-antitrust cases. Each involves the granting or denying of an individual's business rights, even though each also has an effect upon the public interest. At the same time, it is difficult, if not impossible, to draw a factual parallel between litigation over certificates and transfers on the one hand, and the lobbying found in *Noerr* and *Pennington,* or the litigation found in *Button,* on the other. Defendants do not even attempt to draw such parallels.

Defendants attach significance to the fact that a certificate is revocable and that one may overlap another. On the other hand, their differentiation continues, a patent is a property right, may be bought, sold or traded, and, once granted, is exclusive and non-revocable. Defendants fail to explain why such different characteristics of systems of regulation

should require litigation involving one of them to be deemed political. Patents, though not revocable as such, may be held invalid after their grant, may be held unenforceable, may be subject to compulsory licensing in the name of public policy promulgated after letters have issued, and may be cancelled for abusive use. The courts have fashioned rules regulating patents which far exceed specific statutory or constitutional language. The courts have used wide and indeed effective discretion in the making of such rules. Yet, to say that litigation respecting patents is political activity of the type protected in *Noerr* is beyond reason. The cases involving patent litigation have clearly directed otherwise. The system of patents results from constitutional and statutory provisions rooted in a strong public policy which encourages invention. Public policy also pervades the granting of carrier certificates and litigation concerning them.

The involvement of public concern and policy-making in private litigation does not convert such litigation into political expression. Defendants have cited no authority to support the proposition that proceedings concerning a private trucker's application for rights is political activity. They argue that because the standards applied by the commissions to certificate proceedings are derived from the legislature, and the legislature acts primarily as a political body, it follows that the commissions act primarily as political bodies as well. The argument has little meaning, however, when one recognizes that even the adjudication of purely private disputes is undertaken

in light of legislatively derived standards. The courts in the patent-antitrust cases were concerned with applying legal standards and policy which the framers of the Constitution and legislators in their political wisdom required the courts to apply. Defendants have based their argument upon the unsupportable hypothesis that the adjudication of certificate disputes has a greater impact on the public than the adjudication of a patent infringement or misuse dispute.

Defendants also seem to argue that it is the quantity of discretion which a judicial body exercises in resolving a dispute which determines whether the resolution is political or private in nature. (Ap'ees Br. pp. 11, 27-28.) But that too is a bare assertion unsupported by analogy or authority. If discretion were the test, all antitrust litigation would be "political" and *Noerr* protected, for nowhere has Congress delegated greater discretion than it has in delegating to the courts the responsibility for resolving private disputes under the Sherman Act. Antitrust suits, certificate proceedings and patent litigation, like all other adjudications of private interests, have some effect on public policy. Yet, to recognize this fact does not transform private disputes into political activities.

In the present case, the disposition of certificate and transfer applications requires the resolution of private disputes. Public policy of "convenience and necessity" is involved in that it guides a resolution of the disputes, and in turn is defined by the results.

These public policy standards are subject to change through political influence. Defendants have never been precluded from attempting to change regulatory laws or policy through political influence or lobbying. If defendants in the present case had wished to alter the standards governing the granting of carrier rights, they had avenues of redress available to them other than to combine in adversary proceedings before the commissions and courts. If the defendants had truly wished to take advantage of *Noerr* protection, they might have lobbied the commissions and legislative and executive branches and attempted through this process, as in *Noerr,* to change the law governing the disposition of private carrier rights. While they would retain the right to protest applications in certificate proceedings, once the parties have reached such proceedings, defendants would be, as in the patent-antitrust cases, permitted only to protest for the purpose of defeating the applications at hand and thus attempting to influence public policy. Where their protests in what are essentially the resolutions of private rights take the form of a conspiracy not simply to defeat applications or enjoin patent infringements, but to use such opportunities for purposes of restraining trade, such activities are not immune to the antitrust laws.

It is this fact that regulatory agencies and courts provide adjudicative functions which distinguishes the present case from *Noerr, Pennington,* and related authority. In *Noerr* and *Pennington* the only issues involved were the influencing of legislative lawmaking

or executive policy-making. There were no issues, as in the present case, of attempting to use the adjudicative processes as a means of restraining competition. For that reason *Noerr* does not even address itself to the issues of resolving private requests or disputes presented in the patent-antitrust cases or the case at bar.

If the present case did not involve a misuse of commission adjudicatory machinery and court judicial procedures, but involved only an attempt to influence the commissions or legislatures through political activity, plaintiffs would have no legally sustainable complaint. If, for instance, defendants had conspired to use their joint resources to eliminate competition by lobbying the commissions and legislatures to alter their policy of granting rights to competitors, defendants would fall within the protections of *Noerr,* and despite a lack of financial resources necessary to combat such a program, plaintiffs could not sustain a complaint against defendants' activities. The need to protect defendants' ability to petition the government and through the political process inform it of its wishes would, as in *Noerr,* force the courts to refrain from interfering with the political process through application of the antitrust laws to what would otherwise be clearly an illegal antitrust conspiracy. But defendants did not conduct their conspiracy along these lines. They sought to interfere with the judicial process involving the resolution of disputes over private rights, and in so doing they acted in a manner totally uninvolved in the facts or language of *Noerr.*

Plaintiffs believe it is clear as a matter of law that defendants did not engage in political activities, but interfered with a technique of resolving what are essentially private disputes over carrier rights. But even if this court does not find as a matter of law that defendants' activities were essentially non-political in nature, given the indisputable principle that a conspiracy must be engaged in political activity to obtain *Noerr* protection, it is at least a question of fact as to whether defendants were so engaged in this case.

Plaintiffs recognize that the commissions have a dual role—that of helping to make policy much as the legislature would, and having made it, that of applying it to individual applicants as the courts do. Plaintiffs also recognize that this dual role makes it possible for defendants at least to argue that the thrust of their activities was to "make law" through "political" activity. To draw this conclusion on the basis of the allegations, however, is impossible. If such a conclusion can be drawn at all (and plaintiffs believe that it cannot) it must be drawn only by a trier of fact.

The fact that defendants' scheme of litigation may have had some effect on the commissions' standards for granting certificates and transfers cannot in itself make defendants' activities political in nature. If the effect—no matter how great or small—which an adversary proceeding has upon the standards of law applied were to determine whether the proceedings were truly "politi-

cal" or not, as plaintiffs have pointed out, virtually *all* judicial proceedings would be "political" since virtually all such proceedings have at least some effect upon the development of law. To permit that conclusion would be to deny the Supreme Court's distinction between litigation for political as opposed to private purposes, as set forth in *Button* and *Illinois State Bar.* It would also be to deny that the sole activity involved in *Noerr* and *Pennington* was a political petitioning of the legislature and executive, without any adversary proceedings whatsoever. And it would be to deny the existence and validity of the patent-antitrust cases where combinations to restrain trade through the use of judicial machinery—even where probable cause for the patent infringement actions was admittedly present—are not "political", and not protected by *Noerr,* but subject to the Sherman Act.

Considering that patent litigation is private litigation, that personal injury and workmen's compensation litigation are considered private litigation (see *Illinois State Bar*), and that malicious prosecution and abuse of process litigation are equally non-political, it is difficult to conclude that private disputes concerning certificates of public convenience and necessity should be classified as political activity. The lack of essential similarity between the certificate litigation involved here and the Civil rights litigation of *Button* is obvious. Certificate litigation, as well as the others mentioned above, are techniques of resolving private differences. In *Button* the court held that the litigation in question was truly not such a

technique but a form of political expression. Defendants have been foreclosed from no political institution. The fact that their trucking operations under certificates may further the National Transportation Policy is no more significant than the grant or denial of a patent furthering and implementing the important policy of the encouragement of inventions.

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**II. DEFENDANTS' ACTIONS WERE NOT UNDERTAKEN PRIMARILY TO INFLUENCE GOVERNMENT AGENCIES, BUT TO OBSTRUCT OTHERS FROM ACCESS TO THEM. AS SUCH, DEFENDANTS' ACTIONS WERE A SHAM USE OF GOVERNMENTAL PROCESSES, AS DEFINED BY NOERR, AND SUBJECT TO THE SHERMAN ACT.**

Plaintiffs have alleged in Paragraph 8 of the complaint (R. 5-13) that defendants' plan and implementation of it were aimed directly at competitors and not the agencies; that to influence the agencies and the courts was not what defendants principally sought to do: that the result of defendants' combination was to force competing truckers to refrain from filing any applications, and as to those who filed to force them to abandon or compromise their applications through settlements. Defendants have purported to deal with that part of the *Noerr* decision which withholds antitrust immunity for "sham" conduct (Ap'ees Br., pp. 39-43), but their presentation is not persuasive because they have erroneously assumed that plaintiffs charge them with combining to change the policy of the agencies through a system of litigation. As stated before, the complaint alleges otherwise.

As plaintiffs pointed out in their opening brief (Ap'ants Br., 65-73), questions of whether or not defendants' activities were "political" within the meaning of *Noerr* are immaterial if defendants have not restrained trade through government decisions or genuine efforts to obtain them. There is no dispute over this principle. Defendants recognize that not all combinations which result in a restraint of trade are *Noerr*-protected simply because their restraint involves some form of government procedure. It is necessary to determine precisely *how* government is involved, and *how* its processes are used. Where a government agency is genuinely petitioned and a restraint is the product of a government decision or the genuine attempts to influence a decision, then—but only then—the combination is not subject to the Sherman Act even if its members' actual motives were to restrain competition. The need to protect the flow of information necessary for the government to act in its "representative capacity" depends upon leaving unfettered the channels through which those who are governed may petition or communicate with those who govern. The court in *Noerr* recognized that these values outweigh the values of declaring illegal combinations which restrain trade through a genuine use of governmental processes. Undesirable as such combinations are, to illegitimize their activity in order to protect the trade of their target competitors would have the dangerous side effect of impairing the government's ability to govern on the basis of the fullest possible knowledge of what is at stake. Thus, even

where the intent and the effect of the conspiracy are clearly to damage its competitors, where they are effected through a genuine petitioning of government, such petitioning vitiates the otherwise illegal restraint, at least for antitrust purposes.

Where a conspiracy to restrain trade does not in fact use governmental processes to obtain government action, however, the values inherent in protecting an exchange of information and access to government are not present, and the need to forego an examination of the conspiracy's intent and methods of restraint does not arise. Where governmental processes are not used in a genuine effort to influence government, a conspiracy to restrain trade is as subject to the antitrust laws as it normally is where there is no use of governmental processes at all. The Supreme Court recognized in *Noerr* that governmental processes might be involved in a restraint of trade only in appearance, and that such appearance should not serve to immunize the conspiracy from normal Sherman Act standards. (365 U.S. at 144.)

Given this distinction between genuine and sham attempts to influence government, it remains only to be applied to the allegations in the present case. Defendants contend that their actions and purpose were primarily to influence governmental agencies to deny plaintiffs' applications or otherwise to rule in favor of defendants, and that the time, money and effort necessary merely to confront defendants' conspiracy were nothing more than incidental to their allegedly gen-

uine efforts to influence government, and thus only incidentally served to deter plaintiffs from access to governmental agencies.

Plaintiffs contend that defendants' activities and purpose were, on the contrary, directly to suppress and eliminate competition from plaintiffs and other potential competitors, not primarily by attempting to influence the commissions to deny applications, but by preventing plaintiffs and others from seeking carriage rights, and that in the course of doing so, the defendants incidentally influenced some government decisions against plaintiffs' interests. While defendants have not placed physical roadblocks in plaintiffs' path to the commissions and courts, they have created financial roadblocks of even greater deterrent effect.

Several elements of defendants' plan stand out in particular and support this interpretation. These elements are (1) defendants' publicity directed at competitors, not at the agencies or courts, announcing that every application would be protested and appealed to the fullest extent, and that huge sums of money were available to conduct the defendants' program; (2) the decision by defendants, made in advance of the filing of applications, to protest every application, non-selectively, without knowledge of its contents or merits; (3) the withdrawals of protests where applicants settled with defendants even though defendants now allege that they were attempting to influence the making of policy, which would call for pursuing a protest to its conclusion; and (4) protesting by defendant carriers who had no immediate

interest in the plaintiff's application at hand other than that it affected the interests of a co-conspirator.

These unique elements are not present in a plan which seeks to influence government in the manner done by the railroads in *Noerr* or the NAACP in *Button*. Inclusion of such factors in a legitimate plan to influence government, even though anti-competitive in nature, is difficult to imagine. If these and similar factors alleged by plaintiffs do not make out a "sham" cause of action, the sham exception to *Noerr* is virtually meaningless.

Inasmuch as establishing a barrier between plaintiffs and the commissions in part involved the protesting of applications coming before the commissions, defendants had the incidental opportunity of attempting to defeat some of those applications on the merits. As a result, defendant seize this point in their brief and attempt to argue that all of their actions represent nothing more than genuine efforts to defeat their potential competitor's applications by influencing commission decisions. They state that "There is no allegation that defendants did not genuinely try to influence the PUC, the ICC, and the courts" (Ap'ees Br., p. 40); that plaintiffs "admit in their pleadings that defendants were successful in persuading the agencies to deny some of plaintiffs' applications or to grant some only in part" (Ap'ees Br., p. 41); and that in appearing before the agencies and courts, plaintiffs admit that defendants "made the best case the facts would permit." (Ap'ees Br., p. 40.) Defendants attempt to conclude from these "admissions"

that the complaint charges them only with a restraint through their influence over the commissions and courts, and state that while a "sham exception" exists (Ap'ees Br., p. 40), plaintiffs "could not truthfully make the kind of assertions which would have accomplished that result." (Ap'ees Br., p. 40.)

Defendants have misunderstood and misconstrued what is complained of in this case. The complaint alleges that defendants' actions, not government decisions, were successful in stopping the filing of applications. (R. 11.) Their intent and activities were primarily to use government processes—not influence government officials—as a lesson to plaintiffs and others that attempts to obtain carriage rights would be economically futile. To the extent that applications reached the commissions, of course, there was no reason not to try to be successful on the merits, to make the best case the facts would allow, and genuinely to influence commission decisions. But this was an incidental feature of a plan whose objective, function and effect was primarily not to influence government officials, but to clog and encumber governmental processes, and thereby deter applicants even from reaching government officials.

Defendants implicitly recognize that the real damage done by their conspiracy resulted not from incidental attempts to influence government but from their clogging government processes and thereby preventing plaintiffs from seeking rights. That plaintiffs and other potential truckers have in fact been deterred by defendants' conspiracy from filing appli-

cations has never been subject to dispute. The record on this matter speaks for itself. Plaintiffs and other truckers sought and obtained rights consistently until they were faced with the prohibitive costs in time and money resulting from defendants' joint agreement to file protests. It was defendants' conspiracy, implemented and publicized, which abruptly ended applications by plaintiffs and other competitors of defendants. No other conclusion is possible.

Defendants also recognize that it was the prohibitive costs of meeting their protests which made it impossible for truckers to prosecute new applications. They simply argue that there is cost inherent in any protest proceeding and that cost as a deterrent factor, therefore, cannot serve as evidence of a direct restraint or in any other way serve to illegitimize their protests. Defendants' argument simply misses all questions of factual variances which distinguish a genuine from a sham attempt to influence government. Plaintiffs recognize that there is expense incurred by applicants or litigants who must meet a protest or defense which they otherwise would not have to meet. They do not complain of that cost. Indeed, for years plaintiffs and other competitors were met with protests by individual companies which believed that their business interests would be adversely affected by the granting of the rights applied for. Sometimes the protests prevailed; sometimes they did not.

But as plaintiffs have alleged in the complaint and explained in their briefs, defendants' conspiracy de-

feated applications in a manner different both in kind and degree, and the characteristics which can be factually established were not those which can be found in combinations which seek only to influence government. It is clear, as plaintiffs have alleged, that the protests were made to prevent applicants even from "making their wishes known" to agencies and courts. As with all conspiracies, their individual power was transformed into immeasurably greater power merely through the accumulation and joint exertion of purpose and resources. Given these facts it is virtually meaningless to assert, as defendants do, that "any protest is apt to entail expense to applicants . . . but that is inherent in the common law system." (Ap'ees Br., p. 10.) "Any" protest certainly is not apt to entail the same kind or extent of expense to an applicant which defendants' combined protests entailed, and the power exercised by a conspiracy, whether through prohibitive financial expenses or otherwise, certainly is not "inherent" in our common law system, but generally condemned by it. If any common law principle applies, it is that the courts will tolerate the restraints of conspiracies only in the narrowest of circumstances, where the protection of countervailing values simply leaves no alternative. For this reason the Supreme Court in *Noerr* was careful to state that where the conditions for *Noerr* protection are not present—where the conspiracy is not shown *as a matter of fact* to effect its restraint through genuine efforts to obtain governmental decisions—the constitutional values of pro-

tecting governmental decision-making are absent and the direct restraint resulting from the conspiracy's activities are subject to the Sherman Act.

To permit defendants' incidental attempts to influence government to justify their blocking of plaintiffs' access to rights would be to permit the tail to wag the dog. If such were the case, a single genuine protest before a government agency would constitute a license to obstruct an unlimited number of applicants even from attempting to obtain regulated rights. This, we believe, neither *Noerr, Pennington, Button,* nor the Constitution will permit. The sham exception in *Noerr* itself prevents such a possibility. Whether defendants' activities in this case were essentially genuine or ostensible attempts to influence government are questions of degree and of evidence to be weighed by the trier of fact. As such, they are questions which are not presently before the court. The only questions before the court are (1) whether as a matter of law a trier of fact is permitted to find that defendants attempted to use government processes not in a genuine attempt to influence government decisions but in order directly to restrain competition, and (2) whether plaintiffs have alleged such to be the case here. The fact that a sham exception to *Noerr* exists as a matter of law is not subject to dispute. As for plaintiffs' allegations, we believe it is clear that plaintiffs have stated that the purpose and effect of defendants' conspiracy was to prevent competitors from acquiring rights by use of government *processes,* not by attempting to influence government decisions.

For this reason, plaintiffs reiterate that they have the right as a matter of law to prove to a jury that defendants' restraints were imposed not through attempts to influence the agencies and courts, but by interposing their conspiracy between plaintiffs and these forums.

In misconstruing the thrust of the allegations of the complaint, defendants have also misconstrued the relevancy of intent and purpose in this case. They cite language from *Pennington* which states that "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." (381 U.S. at 670; Ap'ees Br., p. 16.) From this they argue that their intent is irrelevant in this action for all purposes. In so doing, they have begged the very question presented—namely, whether their action was primarily a genuine attempt to influence government officials, or was merely an apparent attempt in order to effect a plan of direct obstruction of competitors. It is clear from *Noerr* and *Pennington* that intent and purpose to restrain competition become irrelevant only if it is shown that there was in fact a genuine attempt to influence government officials. Once that is shown (and there were no allegations or issues to the contrary in those cases), the conspiracy's ultimate intent becomes irrelevant. But the threshold question as to whether defendants' conspiracy was genuine or sham must first be asked, and to answer this question it is relevant to

show not only that their actions, viewed objectively, constituted an ostensible use of government processes, but also that they *intended* their actions to be ostensible rather than genuine. If, for instance, plaintiffs could produce a letter authored by defendants stating that "In entering massive protests before the commissions, our intended objective is merely to deter further applications, not to influence commission decisions," that stated intent would be relevant to a showing that defendants' actions were in fact a sham rather than a genuine use of government. Plaintiffs do not possess a letter with these precise words, but do possess correspondence which implies such intent and will show through it and the testimony of witnesses, including members of the conspiracy itself, that the defendants' purpose was in fact to obstruct access rather than influence government. If their activities are found to be primarily a genuine attempt to influence government, under *Pennington* their ultimate intent to damage plaintiffs is irrelevant. But if their activities are found to be primarily a mere ostensible attempt to influence government, to disguise their direct restraint of competition, the protections afforded by *Noerr* do not apply and defendants' intent to damage plaintiffs is merely one factor among many in proving an antitrust violation.

Defendants' attempt to characterize their activities as genuine within the meaning of *Noerr* misses other distinctions between *Noerr* and the present case as well. In *Noerr,* there was no allegation or even suggestion that the primary thrust of the defendants' activities was other than to influence legislation. There

was some incidental direct restraint upon competitors, but the court made it clear that as a matter of degree, direct restraint was a small and inevitable part of the conspiracy's activities.[4] Plaintiffs have alleged exactly the contrary in this case.

In *Pennington* and *Button* too, there were no allegations that any interested parties were restrained from access to the government officials involved. In fact, in *Button* the court found for the NAACP in order to *protect* a group's access to government and their right to make their wishes known—the very thing for which plaintiffs are seeking protection in this case.

The value of protecting plaintiffs' access to the PUC and ICC is nowhere better illustrated than in defendants' own brief. In arguing that the commissions must exercise great discretion in adjudicating applications for rights and transfers, defendants point out the need for regulatory agencies to act on the basis of a wide range of information from those affected by their decisions:

> "While [the commission's] decisions may most immediately affect individual carriers, their decisions must necessarily be based upon the formulation of governmental policy which reaches a large segment of the economy. The question before an agency in a certificate case is, how will the public be affected if the number of competitors in the

[4] "It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed." (365 U.S. at 143.)

> market is increased. Will the service improve or deteriorate? Will costs, and therefore rates charged to the public, go up or down? In short, what economic policy, what degree of competition, will most benefit the shippers and receivers of freight? That question is "legislative" not in the sense that the Legislature, as constituted, can efficiently answer it, but in the fundamental sense that it is a policy making and law-making function, where the dialogue between the people and the administrators is as worthy of protection as any dialogue between the people and their legislators or executives." (Ap'ees Br., p. 35.)

The complaint alleges that it was the purpose of defendants' conspiracy to permit as few applications and as little information as possible from competitors to reach the agencies for their consideration. How is it possible, then, for the commissions and courts to answer these questions of public interest at all, much less accurately, if many of the businesses affected are precluded even from applying and thereby making essential information known? Defendants' argument cited above was made in order to support their contention that *they* must be protected in their efforts to influence the commissions even if the efforts take the form of a conspiracy against plaintiffs. Plaintiffs agree that defendants should be able to make their wishes known to governmental bodies involved even if their ultimate intent is to defeat plaintiffs' rights and thus eliminate competition. But defendants have done something more, and in so doing have gone beyond the narrow protections of *Noerr, Pennington,*

and other authorities cited by defendants. In conspiring to preclude all but themselves from access to the government, defendants have conspired to defeat the discretionary system which they espouse at great length in their brief; have conspired to defeat the constitutional values of exchange of information and the right to petition valued in *Noerr* and *Button;* and have conspired to defeat the individual rights of competitors to carry on their businesses free from the contrived restraints imposed upon them *not* by government decisions or the attempts of defendants to obtain them, but by a massive combination standing between plaintiffs and the governmental agencies involved.

Certainly not any form of government involvement can serve to cloak otherwise direct restraints with *Noerr* immunity. One of the premises of the sham exception is that some form of petitioning of government could be shown. Yet the court recognized that a question of fact remains as to whether this petitioning might be "ostensible" rather than "genuine."

Even if one assumes, as defendants argue, that public officials involved in judicial determinations constitute "government officials" who might be genuinely petitioned by a conspiracy, nonetheless it is the *kind* of behavior and *degree* of restraint which determines whether defendants' conspiracy was primarily a genuine effort to influence government, or was essentially a mock attempt to do so with the genuine effort primarily directed at deterring competitors from seeking rights. Only the trier of fact can answer these questions.

### III. NONE OF THE CASES CITED BY DEFENDANTS SUPPORT THE CONCLUSION THAT THEIR ACTIVITIES IN THIS CASE ARE LEGITIMATE USES OF JUDICIAL PROCESS; ARE NOERR-PROTECTED "POLITICAL ACTIVITY" OR ARE PRIMARILY GENUINE EFFORTS TO INFLUENCE GOVERNMENT.

Plaintiffs have dealt with *Noerr, Pennington* and *Button* at length in the preceding arguments and in their opening brief. As for the other cases cited by defendants, none of them persuasively contradict plaintiffs' arguments.

In the first place, in none of the cases cited by defendants was there an allegation that the defendants incidentally or apparently attempted to influence public officials in order to effect a direct restraint of trade upon their competitors. As a result, none of defendants' authorities support their contention that their activities were primarily genuine attempts to influence government in the present case.

Second, in none of the cases cited by defendants (with the possible exception of *Bracken's,* considered below) did the court find that judicial processes could be used in order to restrain trade or accomplish other illegal objectives.

As a result, the additional authorities cited by defendants are not even arguably in support of their position unless the cases reveal that judicial processes were used for protected "political" activity, as in *Noerr.* In none of the cases cited are these conditions present.

(a) In *Citizen's Wholesale Supply Co. v. Snyder,* 201 Fed. 907 (3d Cir. 1913) the plaintiff supply com-

pany had in a separate action been convicted of violating a municipal ordinance prohibiting door-to-door retail sales of goods and wares. The United States Supreme Court reversed on appeal, and the plaintiff brought the instant antitrust action contending that defendants Snyder and others had induced the police to prosecute under the ordinance as a means of restraining plaintiff's trade.

Unlike the present case, defendants did not themselves use judicial processes against the plaintiff but sought only to influence the police—an executive agency—to bring a court action against plaintiff. Such lobbying would today probably fall within the protections of *Noerr,* and is materially different from the allegations of direct judicial misuse presented in this case.

In addition, the Circuit Court held that the defendants had merely sought in good faith to test the constitutional validity of the municipal ordinance. There was no finding by the trial court or Circuit court that the defendants had coupled this testing of the law with an illegal intent or purpose to restrain plaintiff's trade, as is alleged in the present case. On the contrary, the Court found that "No evidence was offered [by plaintiff] to show impairment of the supply company's trade. . . ." (201 Fed. at 909.)

(b) *Washington Brewers Institute v. U.S.,* 137 F. 2d 964 (9th Cir. 1943) is not even remotely analogous to the present case. On the contrary, the court held that the Sherman Act *did* apply to the combination of brewers who were charged with price-fixing

in violation of the antitrust laws. The defendant brewers, similar to the defendants in the present case, contended that governmental regulation of the industry conflicted with the Sherman Act and thereby immunized them from its application. The court rejected this interpretation conclusively.

Incidental to this finding, the court stated purely as dictum that it knew of no reason why brewers might not "jointly advocate state legislation . . . nor . . . aid the authorities in the policing of any legistion" adopted by the state. (137 F.2d at 968.) The court did not decide that issue, nor did it even suggest what *forms* of "advocating and policing" of legislation would be protected from the Sherman Act. If the court meant that lobbying and similar political approaches to the legislatures and commissions would be protected, *Noerr* and later cases proved it correct. On the other hand, if the court meant to suggest that conspiracies to misuse judicial processes would be protected, the patent-antitrust cases and other later authorities proved the court incorrect. Whatever methods the court had in mind are merely subject to conjecture, however, and cannot serve to sustain either party's position in this case.

(c) In *Harman v. Valley National Bank of Ariz.*, 339 F.2d 564 (9th Cir. 1964) defendants were charged with having induced the state attorney general to file a lawsuit against the plaintiff savings and loan association. The court held that the Sherman Act did not apply since the lobbying of the attorney general, a member of the executive branch of government,

"would be essentially political in nature." (339 F.2d at 566.)

Plaintiffs agree with the court's conclusion. The case is virtually indistinguishable from *Noerr* and *Pennington* since the defendant combination sought to influence a member of the executive branch of the state. Unlike the present case, there is absolutely no contention in *Harman* that the combination sought to misuse judicial procedures as a means of eliminating competition. The attorney general brought a lawsuit against the plaintiff, but that was clearly an act of government protected from the Sherman Act under the doctrine of *Parker v. Brown.* The defendants sought only to influence the attorney general, and within the bounds of *Noerr* such activity was both non-judicial and political in nature.

(d) In *Assoc. of Western Railroads v. Riss & Co.,* 299 F.2d 133 (D.C. Cir. 1962) the defendants, many of whom were also defendants in *Noerr,* were charged with conspiring to suppress competition through many of the same activities as alleged in *Noerr,* none of which consisted of a conspiracy to restrain trade through the use of judicial processes.[5] In fact, the only allegation which was even remotely similar to those in the present case was that defendants' public relations activities induced citizens to register com-

[5]The acts alleged were a public relations campaign against the plaintiffs; lobbying and solicitation of state and city officials to enact laws, ordinances and regulations contrary to plaintiff's interests; lobbying of state officials to enforce statutes, ordinances and regulations contrary to plaintiff's interests; and similar activities. (See 170 F.Supp. at 357, 358.)

plaints against the plaintiff in ICC proceedings for new operating rights. The vast majority of the defendant's activities were not directed at these judicial type proceedings, however, but were clearly political within the meaning of *Noerr*. It is presumably for this reason that the Circuit Court characterized the activities alleged as *Noerr* activities, and did not even choose to mention the existence of the remote influence defendants had on ICC proceedings to resolve the disposition of private rights. In any event, this incidental effect on private rights would have to be held irrelevant since *Noerr* has made it clear that if the predominant nature of the activities is political, incidental restraints of competition, which standing alone would not be protectable, cannot serve to make the political activities subject to the Sherman Act. In the present case a use of judicial processes affecting private business rights is not incidental to political activities but constitutes the principal thrust of defendants' activities with only incidental efforts to influence the agencies.

(e) *Woods Exploration and Prod. Co., Inc. v. Aluminum Co. of Am.*, 36 F.R.D. 107 (S.D. Tex. 1963), and *Woods Exploration and Prod. Co., Inc. v. Aluminum Co. of Am.*, 284 F.Supp. 582 (S.D. Tex. 1968) together represent a split of authority demonstrating the great extent to which the definition of *Noerr*-type "political" activity is unsettled.

As the citations reveal, the *Woods* case came up twice before the District Court for the Southern District of Texas, first on motions to dismiss for failure

to state a cause and for summary judgment, and second for summary judgment. Plaintiffs and defendants both competed for gas derived from the same source. The amounts of gas which the parties were allowed to produce were regulated by the Texas Railroad Commission. The complaint charged the defendants with three kinds of conspiratorial activities aimed at reducing or eliminating plaintiff's production allowances: (1) the filing of false nominations (estimates) with the commission upon which it determined the amount of gas allowable to plaintiffs (see 284 F.Supp. at 584-594); (2) attempting to influence the commission to change its rules and regulations governing production allowances (see 284 F.Supp. at 594-596); and (3) instituting court litigation against plaintiffs in order to contest the validity of commission rules and regulations which permitted favorable allowances to plaintiffs (see 284 F.Supp. at 595-596).

In dealing with defendants' contention that *Noerr* shielded their activities from the Sherman Act, Judge Ingraham, in the first *Woods* case, recognized that *Noerr* protection extended only to political activity. (36 F.R.D. at 111.) Applying this principle to the allegations, the court stated as follows:

> "First, is the conduct complained of in the instant case political in nature? If the defendants were enjoined from conspiring to submit false nominations to the Railroad Commission would they be deprived of any Constitutional right to petition or participate in the Governmental process? The answer clearly seems to be that the defendants would only be prohibited from under-

taking certain joint business behavior. To subject them to liability under the Sherman Act for conspiring to restrict production or to eliminate a competitor would effectuate the purposes of the Sherman Act[4] and would not remotely infringe upon any of the constitutionally protected freedoms spoken of in Noerr.

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[4]Suppression of competition and restriction of production both fall within the common law activities held to be 'combinations in restraint of trade.' In enacting the Sherman Act, Congress took over the common law concept and condemned such restraints wherever they occur in or affect interstate commerce. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 497-498, 60 S.Ct. 982, 84 L.Ed. 1311 (1940)."

(36 F.R.D. at 111-112.)

The Court of Appeals refused to review the District Court's denial of defendants' motion to dismiss, but noted that the defendants were not prejudiced from bringing a motion for summary judgment after the completion of discovery—a motion to which the defendants were normally entitled anyway. Following discovery, the defendants moved for summary judgment, and the allegations were reviewed again, this time by Judge Singleton. The existence of prior discovery, however, had no bearing on Judge Singleton's ruling. He merely reviewed the allegations of the complaint again, as Judge Ingraham had reviewed them before him. That no new factors entered into Judge Singleton's review was made clear by his own recognition that he was merely overruling Judge Ingraham, not ruling on different questions of law or fact.[6]

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[6]In response to plaintiffs' motion that Judge Singleton had no authority to decide the same issues decided previously in the same court, Judge Singleton stated that "Whether to go into

Judge Singleton's authority to overrule a decision by the same court is not in issue here. It demonstrates clearly, however, that even when read most favorably to defendants, the second *Woods* decision represents nothing more than one side of a two judge split of opinion on the scope of *Noerr*-protected activity.

There are additional reasons that the second *Woods* case should not weigh heavily in the present case. The procedure by which the Railroad Commission determined production allowances was not an adversary procedure even resembling a judicial procedure as it is in the present case. The procedure in *Woods* called only for a filing of nominations or forecasts containing mathematical calculations on gas production. (See 582 F.Supp. at 587.) No notice of filings was given or required; no hearings were held; and no arguments were presented. There was no opportunity for defendants to institute protest proceedings causing the plaintiff great expense and delay as there was in the present case. The procedure for determining production allowances was essentially the same as lobbying or otherwise attempting to influence a legislative rule-making body.

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the merits of the question previously decided in a case prior to final judgment is a matter within the considered discretion of the judge. [citing cases]. 'A United States district judge is most reluctant to reverse or change a ruling or order of another district judge, sitting on the same case, in the same court, and will do so only for the most compelling reasons. However, *the authority of a judge to overrule a previous decision of a prior judge, sitting on the same case in the same court is well-established* * * *. *The United States Supreme Court has rejected a doctrine of disability at self-correction* * * *' [citing case]." (284 F.Supp. at 585; emphasis the court's.)

As for defendants' attempts to influence the commission to change the rules, generally these too may be considered in the nature of lobbying or political influence. The attempts were made through *ex parte* filings with the commission, and no attempts were made through a use of judicial processes.

The only judicial processes invoked by defendants were their attempts to protest the commission's standards through court litigation. Judge Singleton found this activity also *Noerr*-protected (relying primarily on *Bracken's Shopping Center, Inc. v. Ruwe,* 273 F.Supp. 606 (S.D. Ill. 1967), considered below), but in this ruling the judge, we believe, was simply incorrect. The court made no mention of the patent-antitrust cases. Those cases, having been decided by higher courts on many occasions (see appellants' opening brief, p. 26, et seq.), would, to the extent of any conflict, clearly override Judge Singleton's ruling in *Woods.*

(f) In *Baltimore & Ohio RR. Co. v. New York, New Haven & Hartford RR. Co.,* 196 F.Supp. 724 (S.D.N.Y. 1961), the counter-defendants were charged with propagandizing the Interstate Commerce Commission and the Senate Committee on Interstate and Foreign Commerce, and with instituting proceedings in the Interstate Commerce Commission and the courts in order to enforce payment of disputed per diem charges. At the conclusion of a lengthy opinion, the district court made reference to these activities and concluded that in addition to the other grounds stated, *Noerr* protected such activities from the Sherman Act.

To the extent that the court applied *Noerr* to the propaganda activities of counter-defendants, plaintiffs have no quarrel with the court's opinion. On the contrary, plaintiffs believe that this activity is representative of the type of political activity which *Noerr* meant to protect.

As for the judicial activity alleged, there was no clear allegation of conspiracy to harass similar to those in the present case, and the court did not attempt a reasoned analysis of the allegations on these grounds. It made a one-line reference to the filing of lawsuits and the propagandizing of the commission implying without explanation that both activities were indistinguishable under *Noerr*. To the extent that this reference can be read as authority for the proposition that conspiratorial uses of judicial proceedings are not subject to the Sherman Act, the patent-antitrust cases clearly speak otherwise, and the court's application of *Noerr* to judicial abuse—if it was meant to be such—is simply incorrect.

(g) In *Bracken's Shopping Center, Inc. v. Ruwe,* 273 F.Supp. 606 (S.D. Ill. 1967) the court found that the defendants' court challenge of a city ordinance, even if coupled with anti-competitive intent, was protected under *Noerr*. In light of the absence of any consideration of the patent-antitrust cases or other authority holding that restraints of trade through judicial processes may be subject to the Sherman Act, plaintiffs believe that *Bracken* is scant authority for defendants' arguments.

(h) In *Schenley Industries, Inc. v. N. J. Wine and Spirit Wholesalers Assoc.,* 272 F.Supp. 872 (D.N.J. 1967), defendants were charged with price-fixing and lobbying the State Legislature and the Alcoholic Beverage Control agency in order to obtain the passage of a bill. (272 F.Supp. at 875, 883, 884, n. 20.) The court found that all of the acts alleged constituted lobbying activities, and thus that *Noerr* and *Pennington* shielded them from the Sherman Act. There was no argument presented that defendants had instituted judicial type proceedings before the agency. The case delineates nicely the type of lobbying activities which should be protected under *Noerr.* Beyond that, however, the case has no bearing on the issues presently before the court.

(i) In *AB&T Sightseeing Tours, Inc. v. Gray Line New York Tours Corp.,* 242 F.Supp. 365 (S.D.N.Y. 1965), the defendants were charged with various anti-competitive activities including "lobbying activities with legislative bodies and administrative agencies of the city of New York to enact and promulgate laws and regulations designed to suppress and eliminate competition between defendant and its competitors, including the plaintiffs." (242 F.Supp. at 369, 370.) The court properly found that these activities were *Noerr*-protected. There were no allegations that defendants had attempted to eliminate competition through a scheme of litigation or the use of administrative judicial type processes. As such, the case is of no support for the proposition that such a scheme is unreachable by the Sherman Act.

(j) In *U.S. v. Johns-Manville Corp.*, 259 F.Supp. 440 (E.D. Pa. 1966) the defendants and co-conspirators were charged with anti-competitive activity including the influencing of state and local government units to adopt specifications adverse to defendants' competitors. The activities consisted of lobbying and other informal approaches and thus fell within the protection of *Noerr*. There were no allegations that defendants and their co-conspirators had attempted to eliminate competition through a program of harassment in judicial proceedings of administrative agencies or the courts. The case, therefore, has no bearing on the issues presently before the court.

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## CONCLUSION

For the reasons stated, it is respectfully submitted that the district court's order dismissing plaintiffs' cause of action be reversed, and the cause remanded for trial.

Dated, San Francisco, California,
May 29, 1969.

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